IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HANKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWIESER,

Appellants,

v.

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF AMERICANS FOR PUBLIC SCHOOLS, AND BAPTIST GENERAL ASSOCIATION OF VIRGINIA

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INTEREST OF THE AMICI CURIAE

The Baptist General Association of Virginia is an association of approximately 1,450 Baptist churches in the

State of Virginia whose congregations number over 500,000 members. The Baptists of Virginia have long been concerned with the constitutional issue of the separation of church and state. They were instrumental in securing the enactment in 1786 of Virginia's Bill for Establishing Religious Freedom, which this Court has recognized as the progenitor of the religious clauses of the First Amendment to the United States Constitution. At present, the Baptists of Virginia operate four colleges and three secondary schools, creating a vital interest in the question of whether taxpayer monies can be used to support sectarian schools under the First Amendment.

The Americans for Public Schools are concerned that federal aid to sectarian schools deprives the public schools of America of urgently needed funds. They have dedicated themselves to the preservation and strengthening of public education. One of the major responsibilities of government is to provide excellent, free education for its citizens. This responsibility cannot be met if public funds are diverted to privately operated schools and the public schools must compete for the limited resources available.

Permission is granted by both parties for the filing of this brief.

STATUTE INVOLVED

The statutory provisions involved in this suit are Titles I and II of the Elementary and Secondary Education Act of 1965 (Public Law 874, Eighty-First Congress).

THE QUESTION PRESENTED FOR REVIEW

This appeal presents the following question: Do citizens and taxpayers of the United States have standing to challenge in the Federal courts an expenditure of Federal funds on the ground that such expenditure is in violation

of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

STATEMENT OF THE CASE

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were made to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds already expended or which will have been expended before issuance of the injunction sought in the action.

The District Court dismissed the complaint on the ground that the action was controlled by the principles laid down in the case of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), that under these principles the plaintiffs had no standing to bring the action, that there was no justiciable controversy, and that the court therefore lacked jurisdiction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy and that the policy considerations which required dismissal in *Frothingham* were inapplicable to a suit based upon the First Amendment. Although conceding that *Frothingham* has been the subject of criticism, the court held that since it had never been overruled or limited by this Court, the court below could not or would not overrule it on its own motion.

SUMMARY OF ARGUMENT

In spite of the interest that they as citizens have in maintaining the absolute "wall of separation" (*Reynolds* v. *United States*, 98 U.S. 145, 164 (1878)), it is alleged that plaintiffs in this case have not demonstrated that they possess the requisite standing necessary to bring the present suit. For this proposition, appellees rely upon the case of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). In that case, a federal taxpayer sought to enjoin administration of the Maternity Act of 1921, which provided for the appropriation of federal funds to combat maternal and infant mortality, on the basis that by enacting the statute Congress had exceeded its delegated powers and usurped powers reserved to the states by the Tenth Amendment to the Constitution. The plaintiff contended that the effect of the appropriation would be "to increase the burden of future taxation and thereby take her property without due process of law." *Id.* at 486. The Supreme Court held in that case that the taxpayer could not maintain the suit, stating in part as follows:

> . . . The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate . . . . But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, or any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity. . . .
>
> . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional . . . . That question may be considered

> only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . *Id.* at 486-488.

We submit that the *Frothingham* case is not dispositive of the issue of standing in this case for several reasons: (1) It does not govern cases alleging encroachments upon First Amendment freedoms, especially cases bottomed on the Establishment Clause; (2) if governing, plaintiffs satisfy the standards set forth in that case; and (3) even if they fail to satisfy these tests, there are important reasons requiring that the Court nonetheless confer standing in this case.

ARGUMENT

I. The Nature of the Injury Caused by Infringement of the Rights of Citizens Under the Establishment Clause is Sufficient to Confer Standing.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As its preeminent location in the Bill of Rights indicates, and as this Court has repeatedly held, all of "the great liberties insured by the First Article" occupy "a preferred position in our basic scheme." *Prince* v. *Massachusetts*, 321 U.S.

158, 164 (1944). Mr. Justice Jackson explained that "this freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Everson* v. *Board of Education*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting), quoted with approval in *Abington School District* v. *Schempp*, 374 U.S. 203, 216 (1963).

This Court has repeatedly declared that the provisions of the First Amendment, and in particular those of the Establishment Clause, are absolute and without qualification. In *Everson*, *supra* at 15-16, the Court said: "The 'establishment of religion' clause means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. . . ." Accord: *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 210-211 (1948); *McGowan* v. *Maryland*, 366 U.S. 420, 442-443 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 492-493 (1961); *Abington School District* v. *Schempp*, *supra* at 216-217. Furthermore, this Court has explained that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*

v. *Vitale*, 370 U.S. 421, 430-431 (1962); *Accord: Abington School District* v. *Schempp*, *supra* at 221. Thus, "the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense." *Everson*, *supra* at 26 (Jackson, J., dissenting), quoted with approval in *Abington School District* v. *Schempp*, *supra* at 216. "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson*, *supra* at 65." *Abington School District* v. *Schempp*, *supra* at 225.

These excerpts show the Court's appreciation of the fact that every breach in the "wall of separation" dividing Church and State, however indirect or quantitatively small, is nonetheless a dangerous encroachment on the fundamental and important individual freedoms sought to be protected by the First Amendment. The Establishment Clause was adopted as a means of protecting the citizen from the dangers which, as history convinced the authors and has confirmed since, inevitably flow from an alliance of the two. Although the enforced separation also protects both parties from the consequences of mutual involvement in each others' affairs, these benefits are only incidental. The primary purpose of the Establishment Clause is to protect the individual, in whose name these associations are inevitably made. The injury done by encroachment upon the principle is, therefore, to every citizen and to all citizens. It is a diminution of the citizen's freedom, and appropriate reason for him to seek redress in this Court.

The nature of the rights protected by the Establishment Clause is such that the injury caused the citizen by their erosion cannot be comprehended in monetary terms. As Judge Frankel pointed out below, the injury is no less real because it "is not merely, or mainly, economic loss. And the roles in which plaintiffs allege injury are not simply their roles as taxpayers. When the Founders proscribed laws 'respecting an establishment of religion', their aim, as Madison described it, was to make it impossible 'to force a citizen to contribute three pence only of his property for the support of any one [church] establishment * * *' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson* v. *Board of Education*, 330 U.S. 1, 63-66 (1947) (Appendix to dissent of Rutledge, J.). It is banal but relevant to say that the concern was not over the three pence. The concern was with a specially cherished form of spiritual and intellectual freedom. . . ." *Flast* v. *Gardner*, 267 F. Supp. 351, 355 (S.D.N.Y., 1967).

Thus, as Judge Frankel suggested, an economic analysis of the plaintiff's interest is inappropriate in a case of this kind. *Ibid.* The proper analysis must comprehend the nature of the rights confirmed by the Establishment Clause, and the identity of the party upon whom these rights are conferred. When, through the action of government, these rights are diminished, the citizen is injured, and must be able to seek redress for that injury in court. The plaintiffs in this case, as citizens, contend that the Elementary and Secondary Education Act infringes the rights conferred upon them by the First Amendment. Their status as injured citizens, and nothing else, gives them the requisite interest to maintain their suit.

This Court stated the test of standing in *Baker* v. *Carr*, 369 U.S. 186 (1962) as follows: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharp-

ens the presentation of issues upon which the Court so largely depends for illumination of difficult questions?" *Id.* at 204. In that case, appellants were challenging the validity of a Tennessee statute apportioning the members of that State's General Assembly on the grounds that it debased their votes and thereby denied them equal protection of the laws. The Court declared that plaintiffs were asserting " 'a plain, direct and adequate interest in maintaining the effectiveness of their votes' . . . not merely a claim of 'the right, possessed by every citizen, to require that the government be administered according to law. . . .' 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' " *Id.* at 208.

The plaintiffs in this case have clearly suffered an injury if their rights under the First Amendment have been encroached upon, regardless of their status as taxpayers. And that injury is surely one which they have a "plain, direct and adequate interest" in preventing *(Baker* v. *Carr, supra),* if only because "it is proper to take alarm at the first experiment on our liberties." *Everson, supra* at 65. In neither case can the injury be measured in any quantitative fashion, financial or otherwise. The injury in both cases is personal to plaintiffs as citizens and is measured properly only by the quality of the wrong they have suffered.

The fact that they share this injury in common with other citizens should not bar their suit. As Professor Jaffe has pointed out, "it begins to be paradoxical to argue that because an allegedly unconstitutional law affects all the citizenry rather than only someone here and there, the Court is without jurisdiction." Jaffé, "Standing in Public Actions," 74 Harv. L. Rev. 1265, 1310 (1961). Here, as in *Baker* v. *Carr* where plaintiffs also suffered

an injury in common with everyone else affected by the statute, plaintiffs should be held to have sufficient standing to protect their constitutional rights regardless of their monetary stake in the outcome of the suit, and regardless of the fact that the wrong was also done to other citizens. To rule otherwise is to declare that this Court will only consider petty infringements of the First Amendment affecting small groups of persons, but will not consider a general attack affecting all citizens. Indeed, it is to say that the Court is powerless to interpose itself against a grand alliance of Church and State to the detriment of all, and is reduced merely to the role of obstructing joint ventures of limited purpose and narrow impact.

The case of *Engel* v. *Vitale*, *supra*, furnishes further support for the view that standing should not depend on financial injury in a case of this kind. In that case, parents of school children challenged a New York law directing a school principal to have a 22 word prayer read aloud in class as an encroachment upon the Establishment Clause. Students who wished to do so could remain silent or be excused during the recitation. The Court recognized that there was no "direct governmental compulsion" shown, but held that "[t]he Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." 370 U.S. at 430. As Professor Sutherland has noted, "the Court's opinion seems to find that the available permission for the child to withdraw, or not to take part in the exercise, has shielded the child from cognizable hardship. Has the parent, despite this, suffered some justifiable wrong *qua* parent? How is the parent any more wronged than his childless but religiously strong-minded neighbor across the street?" Sutherland, "Establishment According to Engel," 76 Harv. L. Rev. 25, 42 (1962). Yet the Court did not question the parents' standing to sue in that case.

See also *Abington School District* v. *Schempp, supra* at 224, n.9; *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

The injury suffered by reason of a breach of the Establishment Clause is necessarily indirect, and somewhat indefinable, as was that of the parent in *Engel, supra.* But the interest of the citizen surely is no more indirect or immeasurable than that of the parent. Thus, we submit that Mr. Justice Brennan was partially correct when he stated that ". . . it might seem illogical to confer standing upon a parent who . . . suffers no financial injury, by reason of being a parent, different from that of an ordinary taxpayer, whose standing may be open to question. . . ." *Abington School District* v. *Schempp, supra* at 267, n. 30 (Brennan, J., concurring). However, the illogic is not in the conferral of standing upon the parent but in the fact that there should be any doubt about a citizen's or taxpayer's standing. The citizen's interest in maintaining the "wall of separation" between Church and State is equally great and equally compelling. The answer to the paradox described by Justice Brennan and Professor Sutherland is that the parent in *Engel* suffered no injury under the Establishment Clause different from his religiously strong-minded neighbor. The plaintiff in *Engel* had standing as a citizen who was coincidentally also a parent.

II. If the Test of Economic Interest Laid Down by *Frothingham* Governs this Case, Then Plaintiffs Have Standing as Federal Taxpayers.

A. Frothingham *did not hold that a suit by a federal taxpayer could never rise to the level of a case or controversy.*

Several aspects of the Court's decision in the case of *Frothingham* v. *Mellon* compel the conclusion that the

Court did not hold that there is a constitutional barrier to the maintenance of a suit by a Federal taxpayer. The first, and most obvious, is that the Court did not say that there was such a barrier, whereas in the companion case of *Massachusetts* v. *Mellon*, the Court specifically stated that "the complaint of the plaintiff State . . . is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power". 262 U.S. at 483.

The Court in *Frothingham* spelled out several other reasons for its decision, all of which indicate that the decision was an exercise of the Court's discretion, and not of obligation under the Constitution. It pointed out that the plaintiff shared her interest in common with millions of other taxpayers, that her particular interest was "comparatively minute and indeterminable", and that the effect on future taxation or payment out of the funds was "remote, fluctuating and uncertain". *Id.* at 487. Thus, the Court's holding that "no basis is afforded for an appeal to the preventive powers of a court of equity" *(ibid.)* is no more than a statement of the familiar principle that a plaintiff, when appealing to the Court's traditionally discretionary equitable powers, must show irreparable harm which can not be remedied by resort to a court of law. Mrs. Frothingham did not show such harm.

It should also be observed that Mrs. Frothingham's claim that her property was taken in violation of the Fifth Amendment was based upon an alleged abuse of the federal principle expressed in the Tenth Amendment. The gravamen of her action being a violation of the division of powers between the States and the Federal Government, it was proper for the Court to regard her litigable interest in this matter as deficient. Questions such as these not being justiciable *(Mellon)*, the slight economic

burden she suffered was inadequate to move the Court into the political arena.

Such restraint is required when political objections to social legislation are recast in legal terms and the controversy is taken to the courts for resolution. But judicial reluctance to hear the claim of a federal taxpayer is misplaced when it is employed to reject a petition alleging the improper use of one's tax monies for the aid of religion. Indeed, it may be more than merely misplaced. The constitutional history of the First Amendment shows the concern of Madison and Jefferson over the use of the taxing power for the benefit of religion. This history strongly suggests that the Court is constitutionally obligated to hear this taxpayer's complaint.

That *Frothingham* at most expresses a policy of judicial restraint is reinforced by the Court's assertion of jurisdiction in *Everson, supra.* For, as this Court pointed out in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), citing *Frothingham*, "what the Court said of a federal statute [is] equally true when a state Act is assailed. . . . [B]ecause our jurisdiction is cast in terms of 'case or controversy', we cannot accept as a basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such". *Id.* at 434. Having adopted the same test for state as well as federal cases, the Court's failure to question Everson's standing can only mean that *Frothingham* is no constitutional barrier to state taxpayers seeking to challenge expenditures violative of the First Amendment. The fact that Everson paid his taxes to the district and not to the federal treasury is not a difference sufficient to rise to the dignity of a constitutional distinction. At most, the issue is whether plaintiffs, as federal taxpayers, have shown an interest in their case at least as strong as Everson did in his—one that warrants asking the Court to exercise its equitable powers.

B. *Plaintiffs show sufficient interest in this case to satisfy the* Frothingham *test.*

In *Doremus* v. *Board of Education*, *supra*, plaintiff taxpayers, challenging Bible reading in the public schools, did not allege any pecuniary interest in order to maintain standing. The Court held that he did not have standing. The Court stated, however, that "Everson showed a measurable appropriation or disbursement of . . . funds". *Doremus* v. *Board of Education*, *supra* at 434. Everson's monetary injury was an indeterminable part of the $357.74 expended for transporting children to parochial school. The personal expense to Everson was therefore undetermined and negligible. In this case also, plaintiff taxpayers are alleging a "measurable appropriation or disbursement of . . . funds". Plaintiffs' injury is an indeterminate part of the billions of dollars expended and to be expended under the challenged program. While the dollar amount going to church-related recipients may not yet be determined, it certainly is not negligible. And the personal cost to plaintiffs may not, in the long haul, be negligible either.

It would be arbitrary to permit Everson to sue as a district taxpayer under the facts of that case, and yet reject plaintiffs' standing here merely because they are federal rather than state taxpayers. *Frothingham* attempted to draw such a distinction, stating that "the interest of a taxpayer of a municipality in the application of its money is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate" because of "the peculiar relation of the corporate taxpayer to the corporation". The distinction, if ever valid, no longer is in today's complicated society. What the Court then said about federal taxpayers is now equally true of state and local taxpayers. The relationship of a taxpayer to his state or city government no longer has "some resemblance to that subsisting between stockholder

and private corporation" (*Frothingham*, *supra* at 486). Rather, state and local taxpayers today also have an "interest in the moneys of the [state and local treasuries] —partly realized from taxation and partly from other sources—[which] is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds . . . [is] remote, fluctuating and uncertain . . ." *(Ibid.)*. Furthermore, as Professor Davis pointed out in testimony before The Subcommittee on Constitutional Rights of the Senate Judiciary Committee (Hearings on S. 2097, 89th Cong. 2d Sess., p. 493):

> The Court [in *Frothingham*] said that the effect of a Federal expenditure on a Federal Taxpayer was "comparatively minute and indeterminable." That was true as of 1923. But it is not true as of 1966. Taxes that almost any corporation pays to the Federal Government are no longer "comparatively minute" as against taxes the same corporation pays to municipalities. . . . The tax facts on which the *Frothingham* opinion was based have now turned right around backwards. . . . Because the rule of the Supreme Court since 1879 has been and still is that a municipal taxpayer has standing, and because that rule is clearly sound, a Federal taxpayer should now *a fortiori* have standing.

Thus, viewed in terms of the tests laid down by *Frothingham*, and as applied in prior cases, these plaintiffs as federal taxpayers stand in no worse light than have other litigants who have relied upon their contributions to local treasuries as the measure of their claim to maintain their case. Accordingly, they meet the criteria governing standing which were outlined in *Frothingham* and should be heard here.

III. The Magnitude of the Issue Presented in The Suit is Sufficient to Confer Standing on the Plaintiffs Even if They Fail to Meet the *Frothingham* Test.

The issue presented by this case is precisely that which it is the function of the Court to decide. The controversy is mature, the parties are antagonistic, the question is justiciable in the ordinary sense, and the relief prayed for does not threaten to involve the Court in duties alien to its processes. Cf. *Baker* v. *Carr*, *supra*. No judicial doctrine of abstention or constitutional principle governing litigation is involved other than the question of standing.

As noted by Justice Brennan, "the concept of standing is necessarily a flexible one" (*Abington School District* v. *Schempp*, 374 U.S. at 267, n. 30 (Brennan, J., concurring)). Where, as here, plaintiffs have "very real grievances . . . which cannot be resolved short of constitutional adjudication" *(ibid.)*, this Court should confer standing whether or not the plaintiffs meet the conventional tests. They present "weighty countervailing policies here to cause an exception to our general principles". *McGowan* v. *Maryland*, 366 U.S. 420, 430 (1961). See also *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court held that a private corporation devoted to secular and religious education had standing to challenge the constitutionality of the Oregon Compulsory Education Act which required that parents send their children to public elementary schools. The Court readily conceded that the corporation could not claim for itself "the liberty which the 14th Amendment guarantees." *Id.* at 535. However, it went on to note that the corporation's business and property were "threatened with destruction through the unwarranted compulsion which [Oregon was] exercising over prospective patrons of their schools", and that "this Court has gone very far to protect against loss threatened by

such actions". The Court accepted jurisdiction over the case despite the alleged defect in the plaintiffs' standing.

The Court in *Pierce* was moved to accept the suit, not so much because the claim of injury was so importunate, but rather because the financial injury that was threatened stemmed from a clear violation of the Free Exercise Clause. So blatant was the violation that the Court waived its ordinary rules and, in effect, permitted the Society standing *in loco parentis* of the children, whose right to pursue a religious education was infringed. The interest of the plaintiffs in this case is more important than the corporate health of the Society, and certainly more direct. The Court should go just as far to protect this interest even if, as it did in *Pierce*, it must ignore some of the technical requirements of standing in order to do so.

The magnitude of the issues raised in this suit completely overshadows the technical rules of standing set forth in *Frothingham*. The principle expressed in the Establishment Clause, and as restated by this Court in every pertinent case, is of the first order of importance. The historical events which led to the incorporation of this principle in the Constitution demonstrate the danger posed by the association of government in church affairs, and of the church in government. The experience of the past demonstrates the possible results when governmental power is exerted to tax citizens for the benefit of religion. The modern experience of other societies, and suggestions now being raised in our own, illustrate the threat to public education which may result from mutual involvement unchecked by judicial review. The spectre raised by this Court, that "[t]he breach of neutralism that is today a trickling stream may all too soon become a raging torrent", will be all too real if the Court decides against these plaintiffs.

The Court should recognize the possible consequences of a decision which denies standing to citizen-taxpayers

to challenge federal appropriations deemed to contravene the Establishment Clause. There are no other potential litigants who may raise this issue adequately before the Court. While nimble imagination may devise a set of circumstances in which a public institution, denied what it considers its full share, might complain that a church-related school received federal funds in violation of the First Amendment, or one in which a public official defends his refusal to carry out the dictates of the statute on the grounds that to do so would be unconstitutional, as a practical matter these speculations are not likely to be realized. As citizens and taxpayers, these plaintiffs are probably the only type of litigants who can present this type of controversy before the Court and, because they present the constitutional controversy in its clearest and sharpest guise, they are the best possible litigants that may be expected.

Finally, it should be recognized that the result of holding that this class of plaintiffs has no standing would be to reduce the Establishment Clause to a minor rule of law governing errant States. The Clause henceforth would have vitality only against State legislatures, although it is applied to them indirectly through the 14th Amendment, and then only since 1940. The principle would no longer serve as an effective restraint upon Congress, despite the words of the provision and its original intent. On religion and the First Amendment, the law of the land would be less majestic than ironic.

In short, because the consequences of failing to permit this type of plaintiff to maintain this suit are so inimical to the constitutional principle involved, the situation warrants the conferring of standing as an extraordinary grant. This the Court has done before, even at the expense of weightier obstacles than those presented by *Frothingham*. E.g., compare *Baker* v. *Carr*, *supra*, with *Colegrove* v. *Green*, 328 U.S. 549 (1946).

The history of congressional stalemate on legislation authorizing judicial review highlights the need for Court action. For the past five years the Senate has overwhelmingly approved legislation to overrule the *Frothingham* case as respects First Amendment suits. These attempts, reflecting Senate conviction that the case expresses merely a doctrine of restraint which is inappropriate in the area of the First Amendment, have consistently come to naught because of resistance by the House of Representatives. The most recent example occurred on December 1, 1967, when a judicial provision was added on the Senate floor to the 1967 Amendments to the Elementary and Secondary Education Act. (Title VIII, H.R. 7819, 90th Cong. 1st Sess.; 113 *Cong. Rec.* S17699 (daily ed. Dec. 1, 1967)). The provision was deleted in conference at the insistence of the House. A similar amendment was deleted in 1963 from the Higher Education Facilities Act, and in 1966 and 1967, the House also refused to consider Senate-passed judicial review legislation.

The inability of Congress to overrule the *Frothingham* precedent means that, as a practical matter, the only foreseeable opportunity for judicial consideration of the First Amendment questions in federal aid to church-related schools lies before the Court in this case. The legislative action was initiated because of the previous reluctance of this Court to reverse or clarify its own rule of decision. The failure to enact repealing legislation means that the obligation once again is placed solely on this Court.

CONCLUSION

For the reasons stated above, and for the reasons submitted by appellants, the Court should reverse the decision of the court below and remand the case for trial on the merits.

Respectfully submitted,

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Attorney for Amici

December 1967